IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. .....

RICHARD A. KENT, Petitioner,

versus

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Richard A. Kent, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Fifth Circuit filed July 26, 1946, affirming a final decree in the District Court for the Eastern District of Louisiana, condemning as for-

feited to the United States a truck and about fifty-two cases of distilled spirits. (R. 140)

JURISDICTION

Jurisdiction is based on Section 240(a) of the Judicial Code, as amended, 28 U.S. Code 347. Rehearing was denied August 28, 1946.

OPINIONS BELOW

The opinion of the District Court is reported in 62 F. Supp. 749. It is printed at pages 132 to 138 of the record. The opinion of the Circuit Court of Appeals is not reported. It is printed at pages 150 to 152 and 157 to 159 of the record.

SUMMARY STATEMENT

This is a proceeding brought to adjudicate as forfeited to the United States certain property consisting of a truck and liquors. The libel of information, as amended, alleges that petitioner Kent was in possession of the property with intent to use the same in violation of the internal-revenue laws, (R. 20-24), and claims forfeiture under Section 3116, Title 26 Internal Revenue Code which provides a forfeiture of property possessed with intent to use in violation of the internal-revenue laws. The issue resolved itself to whether petitioner Kent was, at the time of seizure of the liquors, transporting the same to a certain place where he was duly registered as a retail liquor dealer under the internal-revenue laws or to be sold otherwise. As to this, the District Court, sitting without a jury, said:

"In other words, if Kent was transporting the liquor in question to the Spot for retail purposes, he was not violating the law. If however he intended to sell the liquor anywhere else in Mississippi or anywhere at all in Louisiana, either wholesale or retail, he was disregarding the provisions of 26 USCA 3116, which reads in part as follows:

" 'It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part (relating to industrial alcohol), or the internal-revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property . . .'

"The question of Kent's intent, therefore, is crucial in the instant case."

The District Court considered evidence of long prior transactions to the date of seizure in which petitioner was involved, and which the court considered as violations of the internal-revenue laws, and also purchases of liquor subsequent to the date of seizure. There was no evidence offered of any violation of the internal-revenue laws at the time of the seizure of the truck and liquors, and, as the Circuit Court of Appeals on appeal said:

"The question at issue is not whether Kent had committed a crime by transporting the liquors by means of the truck, *for he had not*, but whether he was using the truck and liquors with the intention of committing a crime in the near future. Since no crime had been consummated. * * *" (R. 158) (Emphasis supplied).

And, as to Kent's intention for the disposition of the liquors, the District Court said:

> "He more than any other human being in the world knows what plans for the disposition of the liquor he was harboring on June 2, 1944, when the liquor was seized. Yet Kent has seen fit to remain silent throughout these proceedings, although he has intimate knowledge regarding the controverted issue of intent. The Court is not willing to ignore this significant silence."

The District Court concluded that Kent intended to sell the liquors at a place or places other than the place he was duly registered under the internal-revenue laws, (R. 139), and adjudged the truck and liquors forfeited. (R. 140).

The District Court inferred such unlawful intent because Kent did not testify. And as to this the Circuit Court of Appeals said:

> "It was not error to consider Kent's failure to testify as a circumstance indicative of the truth. * * * The provision of the Fifth Amendment: 'nor shall be compelled in any criminal case to be a witness against himself' has no application. This is not a criminal case but a civil case, and no one seeks to compel Kent to testify. He has voluntarily appeared in the case as claimant. He voluntarily does not tell what he knows. His silence may well count against him, as against any other civil litigant. So also the Statute, 28 U.S.C.A. § 632, providing that the 'person so charged' shall be a competent witness at his own request but not otherwise; 'and his failure to

> make such request shall not create any presumption against him,' is without application, for it is limited to 'the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors.' This is not such a trial. Kent is not here charged with any crime or offense. This property is alleged to be forfeited under 26 U.S.C.A. § 3116, because 'intended for use in violating the provisions . . . of the internal revenue laws'." (R. 152)

Upon motion for rehearing, the Circuit Court of Appeals said that the question urged by petitioner that under the decision of this Court in *Boyd v. United States, 116 U.S. 616*, and cases following it, require that this proceeding for forfeiture, for the purpose of the questions raised, that is, the application of the Fifth Amendment, should be treated as a criminal case, was interesting, but said they did not think so. The court gave as reason for its conclusion that the forfeiture herein was not for a committed offense, but for intended offenses, and the statute did not provide for fine and imprisonment against petitioner in addition to the forfeiture of his property. The court held the proceeding herein preventive and remedial, rather than punitive or criminal in nature, comparing the instant case with *Helvering v. Mitchell 303 U.S. 391.*

QUESTIONS RAISED:

1. Is not *Boyd v. United States, supra*, applicable to any proceeding for forfeiture of property?

2. Is not a proceeding for forfeiture of property for the act of the owner of property in possessing property for

intended unlawful use of a punitive and criminal nature, instead of a preventive or remedial nature, making applicable thereto that portion of the Fifth Amendment that no person shall be impelled to testify against himself?

3. If the failure of a party to testify in a proceeding for forfeiture of his property, is to be construed as an unfavorable inference against him, is not his privilege under the Fifth Amendment prohibiting a person being compelled to testify against himself, annulled and totally destroyed?

4. Is not the statute 28 U.S.C.A. 632, providing that the "person so charged" shall be a competent witness at his own request but not otherwise; "and his failure to make such request shall not create any presumption against him," applicable to a proceeding for forfeiture of his property based upon breaches of the law allegedly committed by him, to the same effect, as in a proceeding where he is subject to a fine or imprisonment?

REASONS FOR GRANTING THE WRIT

1. The court below has unduly restricted the decision of this court in the *Boyd* case, *supra*, and cases following it, and contrary to the language of this court in its opinion therein, particularly the following:

> "A witness, as well as a party, is protected by the law from being compelled to give evidence that tends to criminate him, *or to subject his property to forfeiture.* Queen v. Newell, Parker, 269; 1 Greenl. Ev. §§ 451-453. But, as before said, although the owner of goods, sought to be forfeited by a proceeding in rem, is not the nomi-

nal party, he is nevertheless the substantial party to the suit; he certainly is so, after making claim and defense; and in a case like the present he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense." (Emphasis supplied)

And in conflict with the language of this court in *Counselman v. Hitchcock, 142 U. S. 547, 563, 564,* wherein this court said:

"It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him *or subject him to fines, penalties, or forfeitures.* Tex v. Slaney 5 Car. & P. 213; Cates v. Hardacre, 3 Taunt, 424; Maloney v. Bartley, 3 Campb. 210; 1 Stark. Ev. 71, 191; Sir John Freind's Case, 13 How. St. Tr. 16; Earl of Macclesfield's Case, 16 How. St. Tr. 767; 1 Greenl. Ev. § 451; 1 Burr's Trial, 244; Whart. Crim. Ev. (9th Ed.) § 463; Southard v. Rexford, 6 Cow. 255; People v. Mather, 4 Wend. 229; Lister v. Boker, 6 Blackf. 439." (pp. 563, 564) (Emphasis supplied)

And in holding the proceeding herein not criminal in nature, the court below is in conflict with this court in the *Boyd* case, *supra,* and in *Lees v. United States, 150 U.S. 476,* which latter case involved a proceeding to recover a penalty, and as to the nature of such a proceeding, this court said:

"This, though an action civil in form, is unquestionably criminal in its nature, and in such

> a case a defendant cannot be compelled to be a witness against himself. It is unnecessary to do more than to refer to the case of Boyd v. United States, 116 U.S. 616 (29:746). The question was fully and elaborately considered by Mr. Justice Bradley in the opinion delivered in that case. And within the rule there laid down it was error to compel this defendant to give testimony in behalf of the government."

And the court below is in conflict with the holding of the Ninth Circuit following the *Boyd* and *Lees* cases, *supra*, in *P. E. Harris & Co. v. O'Malley, 2 F. (2d) 810*, which court therein held that forfeiture proceedings while civil in form, are criminal in nature, and therein said that the "requirement that proceedings in forfeiture shall be *in rem* under rules in admiralty effects the form but not the character of the proceeding."

And the court below in holding that that portion of the Fifth Amendment that no person can be compelled to be a witness against himself, is not applicable to the forfeiture proceeding herein, is in conflict with the Ninth Circuit in *P. E. Harris & Co. v. O'Malley, supra*, and the cases following the *Boyd* and *Lees* cases, *supra*, which cases consider the question settled that proceedings for forfeiture are so far criminal as to come within that portion of the Amendment. That as said in *United States v. Eight Packages of Drugs (D.C.S.D. Ohio), 5 F. (2d) 971, 976:*

> "* * * there is a long list of cases, beginning with Boyd v. U.S., 116 U.S. 616, 634, S. Ct. 524, 29 L.Ed. 746, which hold that proceedings in seizure and forfeiture are so far criminal as to come

> within the meaning of the Fourth Amendment. Lees v. U.S., 150 U.S. 480, 14 S.Ct. 163, 37 L.Ed. 1150; Stone v. U.S., 167 U.S. 178, 187, 17 S.Ct. 778, 42 L.Ed. 127; State v. Chicago, B. & Q. R. Co. (C.C.) 37 F. 497, 500, 3 L.R.A. 554; State v. Day Land, etc. (C.C.) 41 F. 518; Snyder v. U.S. 434, 6 S.Ct. 432, 29 L.Ed. 681; Clifton v. U.S., 4 How. 242, 250, 11 L.Ed. 957."

And further said:

> "The propriety of these views has not been questioned, so far as this court, after much research, has been able to ascertain, and they are summed up by Mr. Justice Harlan in Hepner v. U.S., 213 U.S. 103, 111, 29 S.Ct. 474, 478 (53 L.Ed. 720, 27 L.R.A. (N.S.) 739, 16 Ann. Cas. 960) in this language: 'In the latter case (Boyd v. U.S.) it was adjudged that penalties and forfeitures incurred by the commission of offense against the law are of such a quasi criminal nature that they come within the reason of criminal proceedings for the purposes of the Fourth Amendment of the Constitution and of that part of the Fifth Amendment declaring that no person shall be compelled in any criminal case to be a witness against himself.' "

See also *United States v. Fifty-eight Drums of Material, Etc. (D.C.W.D. Penn.) 38 F. (2d) 1005.*

2. The court below in comparing the case herein with *Helvering v. Mitchell, supra,* is giving an erroneous interpretation thereto, as in that case a forfeiture of property was not involved, but a remedial sanction for the benefit of the Government for reimbursement for expense incurred in investigating the fraud of the taxpayer, collectible ad-

ministratively by distraint. If that case is to be construed as including forfeiture proceedings within the class of remedial sanctions, is contrary to the language of this court in *Stone v. United States, 167 U.S. 178, 187* in differentiating a case of a civil nature from one of a criminal nature, as follows:

> "This is not a suit to recover a penalty, to impose a punishment, *or to declare a forfeiture.*" (Emphasis supplied)

If that portion of the Fifth Amendment which provides that no person can be compelled to testify against himself is applicable to a forfeiture proceeding as in the instant case, the court below in holding that it was not error of the district court drawing an unfavorable inference for the failure of petitioner to testify, destroys and totally annuls the foregoing privilege under that amendment, and is in conflict with the Circuit Court of Appeals for the Second Circuit in *Pennsylvania R. Co. v. Durkee, 2ud Cir., 147 F. 99, 102*; wherein the court said:

> "The conclusion reached was that the rule as to drawing unfavorable inferences from the failure of a party to produce evidence 'is not to be applied to those cases where the law, on grounds of public policy, has established privileges against being compelled to produce it,' and also that, '*if the failure to produce the testimony is to be construed as a circumstance against the party, his privilege would be annulled and entirely destroyed,*' Johnson v. State, 63 Miss. 316; Newcomb v. State, 37 Miss 383; Knowles v. People, 15 Mich. 408.

> "The Appellate Division of the Supreme Court of New York for the First Department has apparently reached a different conclusion in Deutschmann v. Third Ave. R. R., 87 App. Div. 503, 84 N.Y. Supp. 887. That case seems not to be in accord with the general consensus of judicial opinion, and, since the question is not one of interpretation of a state statute, but deals only with the general law of evidence, there is no reason apparent why this court should follow it." (Emphasis supplied)

3. The court below in holding that the statute 28 U.S.C.A. 632 providing that the "person so charged" shall be a competent witness at his own request but not otherwise; "and his failure to make such request shall not create any presumption against him," is without application (R. 152), is untenable, as not in conformity with the decisions of this Court in the *Boyd* and *Lees* cases, *supra*, applying that portion of the Fifth Amendment that no person shall be compelled to be a witness against himself to forfeiture proceedings as in purely criminal proceedings, as such proceedings are so far criminal in nature that such statute should be applicable.

Wherefore petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit commanding that court to certify and to send to this court for its review and determination on a day certain to be named therein a full and complete transcript of the record of all proceedings in the case numbered and entitled, *Richard A. Kent Claimant-Appellant versus United States of America, Appellee, No. 11529*, and that

the decision of the said Circuit Court of Appeals in said case be reversed, and that your petitioner have such other and further relief in the premises as may be just.

RICHARD A. KENT, Petitioner.
By M. A. GRACE,
EDWIN H. GRACE,
Counsel.

CERTIFICATE

We hereby certify that we have examined the foregoing petition, that in our opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

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New Orleans, La.,
October ___, 1946.

APPENDIX

Section 3116, Title 26, Internal Revenue Code:

> "It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in title XI of the Act of June 15, 1917, 40 Stat. 228 (U.S.C. Title 18 §§ 611-633) for the seizure of such liquor or property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal-revenue laws, or of any other law. The seizure and forfeiture of any liquor or property under the provisions of this part, and the disposition of such liquor or property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such liquor or property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal-revenue laws, 53 Stat. 362."

Section 632, Title 28, U.S.C.A.:

> "In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States Courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."